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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

JAN 24 1991

REPLY TO ATTENTION OF:

Sherry A. Enzler
Special Assistant
Office of the Attorney General
~~State~~ of Minnesota
Government Services Section
525 Park Street
Suite 500
St Paul, Minnesota 55103

RE: Great Lakes Asphalt, Zionville, Indiana
Site No. FL

Dear Ms. Enzler:

I am in receipt of your letter of January 14, 1991 regarding the Great Lakes Asphalt Site in which you expressed your client's position that the definition of covered matters in the de minimis settlement in U.S. v. American Waste Processing, et al. and U.S. v. United Technologies Automotive, Inc. preclude their liability for the Great Lakes Asphalt Site.

Enclosed is a copy of language that was proposed for inclusion in the de minimis consent decree by the de minimis parties. As you will note, in Section VI, it states:

> Except as otherwise provided in Section VII below, the United States covenants not to sue the De Minimis Settling defendants with regard to "Covered Matters". For purposes of Section VI., "Covered Matters" shall refer to any liability that could be imposed upon any of them with respect to or in any way arising from the Site under Section 106 or 107 of CERCLA . . . and all other claims available under any state or federal statute or regulation or under common law (except as specifically exempted below), including without limitation, obligations or liability arising from off-site contamination which may have resulted from the disposal of waste material at the Site, obligations or liability arising from actions or omissions of the persons conducting or funding the remediation of the Site or their contractors, and obligations or liability arising from the Site by persons conducting or funding the remediation of the Site or their contractors and

placement or disposal of such wastes or contaminated materials at any other site.

The underlined language was proposed for inclusion by the de minimis parties. However, it was rejected by the U.S. EPA and was not included in the consent decree. Thus, by its rejection of the above quoted language, it is evident that it was not the intent of the U.S. EPA to release the de minimis parties for any potential liability that they may have at the Great Lakes Asphalt Site. If you are aware of any U.S. EPA employee who represented to you or to any other de minimis party that the settlement was to include a release for the Great Lakes Asphalt Site, please provide me with this individual's name. Upon obtaining such information, I would be willing to reconsider your position. Absent such information, U.S. EPA's rejection of the above quoted language clearly demonstrates that the covenant not to sue in the de minimis consent decree was not intended to exclude potential liability for the Great Lakes Asphalt site.

I would refer you to the entire memorandum as evidence as to the scope of the covenant not to sue that was granted to the de minimis settlors. Nowhere in the memorandum is Great lakes Asphalt mentioned or even implied. However, the memorandum is replete with language that it covers the Envirochem site: specifically, pages 1-2, which state that the settlors will reimburse U.S. EPA for costs incurred in connection with the Envirochem site, pages 2-3, which talk about the two lawsuit the U.S. EPA filed in connection with the Envirochem site, page 3, regarding the site history, which only refers to Envirochem, page 4, which states that the consent decree resolves claims against the defendants in connection with the Envirochem site, page 8, which states that the decree is fair and results in an agreement with those parties responsible for contamination at the Envirochem site, pages 8-9, which state that the settlement provides for payment into Superfund a portion of U.S. EPA's costs in connection with the Envirochem site, and page 9, which discusses the recovery of funds from those generators who disposed of hazardous waste at the site.

Therefore, based on the above information, it is the U.S. EPA's position that the de minimis consent decree does not exempt or preclude the settling de minimis parties from liability at the Great Lakes Asphalt Site, and that the applicability of the defense of Section 107(b)(3) is not certain. The position that your client will take is obviously a matter for your mutual decision and analysis. This letter is merely to inform you of U.S. EPA's position as to the claims raised in your letter.

Lastly, you stated that there "appears to be no basis for the U.S. EPA's claim that any part of the 165 gallons of waste sent by MnDOT to the Envirochem site was ever sent to the Great Lakes site for storage." Though I do not recall the specifics of our telephone conversation, it is the U.S. EPA's position that it

is seeking the recovery of the public funds that were expended to clean up the Great Lakes Asphalt Site based on a market liability theory. It is known that the material that was released from the Great Lakes Asphalt site came from the Envirochem site, and that MnDOT sent materials to the Envirochem. Absent evidence that the waste that MnDOT sent to the Envirochem site is inconsistent with the material that was removed from the Great Lakes Asphalt site, U.S. EPA must assume that the material of any and all companies that had been shipped to the Envirochem site could have in turn been shipped to the Great Lakes Asphalt site.

If you have any further questions regarding the Great Lakes Asphalt Site, please feel free to contact me.

Sincerely,

Peter M. Felitti
Assistant Regional Counsel

Enclosure